**ADAMS Construction Co., Inc.**

**CONTRACT NO. V534C-310** **VABCA-4669E, 4900E**

**VA MEDICAL CENTER**
**Charleston, South Carolina**

***Stan Barnett, Esq*., Smith, Bundy, Bybee & Barnett, P.C., Charleston, South Carolina, for the Appellant.**

***Joan S. Ratliff, Esq*., Government Trial Attorney, Ridgeland, Mississippi; *Paul A. Embroski, Esq*., Trial Attorney; and *Phillipa L. Anderson, Esq*., Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.**

**OPINION BY ADMINISTRATIVE JUDGE KREMPASKY**

Adams Construction Company, Inc. (Adams or Applicant) has submitted an application for $26,044.49 in attorney fees and expenses under the *Equal Access to Justice Act* (*EAJA*), 5 U.S.C. § 504, in relation to the appeals in VABCA-4669 and 4900.

The Board issued its decision in VABCA-4669 sustaining Adams' appeal of the Department of Veterans Affairs' (VA or Government) default termination of Contract No. V534C-310 (Contract) on February 13, 1997. ***Adams Construction Co., Inc.***, VABCA No. 4669, 97-1 BCA ¶ 28,801. Familiarity with this decision is presumed. Adams also appealed the VA's final decision asserting a claim against Adams for the excess costs of reprocurement; the Board docketed this appeal as VABCA-4900. On March 4, 1997, in an unreported Order Of Judgment, the Board sustained the appeal in VABCA-4900 on the basis that the Board's decision in VABCA-4669 converting the termination for default to a termination for convenience extinguished any legal basis for the VA's assessment of excess reprocurement costs.

DISCUSSION

Timeliness And Itemization Of Application

This application is timely and we find it to be sufficiently itemized to support an award of fees and expenses pursuant to *EAJA*.

Size Eligibility for recovery of attorney fees and expenses

The VA has not questioned Adams' eligibility, under the pertinent *EAJA* statutory size standards, to recover fees and expenses in the litigation of these appeals. Based on the net worth statements submitted by Adams, we find the Applicant eligible to recover attorney fees and other expenses in this application.

Prevailing Party

In order to recover fees and expenses incurred in litigating this appeal, Adams must be a "prevailing party" in the litigation. Adams totally prevailed in both VABCA-4669 and

4900, obtaining the complete relief it sought. The VA does not contest that Adams is a prevailing party. Thus, under the standard established by the Supreme Court in ***Hensley v. Eckerhart***, 461 U.S. 424, 433 (1983), Adams is a prevailing party. *See also* ***Farrar v. Hobby***, 506 U.S. 103 (1992); ***Warbonnet Electric, Inc.***, VABCA-3731E, *et. al*, 96-2 BCA ¶ 28,480; ***Penn Environmental, Inc.***, VABCA-3599E, *et. al.*, 94-1 BCA ¶ 26,326.

Substantial Justification

As the prevailing party in the action, Adams may recover its attorney fees and expenses if the Government's position during the course of the actions was not substantially justified. 5 U.S.C. § 504(a)(1); ***Warbonnet***, 96-2 BCA ¶ 28,480. Once, as is the case here, an applicant avers in what respect the Government's position in the litigation was not substantially justified, the Government carries the burden of proving that its position was "substantially justified" in order to avoid the assessment of the applicant's allowable and reasonable fees and expenses against it. ***Marino Construction Co., Inc.***, VABCA No. 2752E, 92-2 BCA ¶ 25,015.

The VA, citing ***Warwick Holding Co., Inc.***, GSBCA Nos. 8459C(5070), *et.al.* 88-3 BCA ¶ 21,114, argues that, because Adams has not identified "with particularity" the position of the Government that was not substantially justified, the Board should look at the totality of the Government's conduct and conclude that the Government's position was substantially justified. The VA points us to the VA's "good faith" efforts to resolve early performance problems in the Contract and the VA's informing Adams that it would cooperate in scheduling requirements to further the work as the basis for finding that the Government's default termination and assessment of reprocurement costs were substantially justified.

The import of the VA's argument is left to our speculation in as much as the GSBCA, in the case cited, provides no explanation of the "particularity" requirement and the VA does not explore its parameters. To the extent that the assertion implies that Adams has a burden to prove that the VA's position was not substantially justified or that the VA's burden of proof to establish substantial justification is somehow lessened if an applicant is not particular enough in its allegation concerning substantial justification, it is rejected. Adams' assertion in the Application that the VA's positions in both the termination for default and assessment of reprocurement costs were not substantially justified is sufficiently "particular" to meet the threshold requirements of an *EAJA* application. Adams has no burden to prove that the Government's position was not substantially justified; it is only required to make the allegation. ***Marino***, 92-2 BCA ¶ 25,015; ***Siska Construction Company, Inc.***, VABCA No. 3381E, 92-1 BCA ¶ 24,730.

The VA correctly points out that determining whether it was substantially justified in the positions it took in these appeals is a matter within the discretion of the Board after review of the entirety of the Government's conduct. In support of its argument that it was substantially justified during the course of the litigation, the VA is also correct in pointing out that it worked with Adams, to some extent, to resolve the scheduling problems that arose in the performance of the Contract. The VA fails to note, however, that it precipitously terminated the Contract for default after consulting with Adams to set a reasonable schedule and modifying the Contract to incorporate a new performance schedule into the Contract. The VA also consistently adhered to its position of not

permitting overtime or weekend work that was required for timely completion. Viewing the Government's conduct as a whole, we find the VA's position in VABCA-4669 not to have a reasonable basis in law or fact. ***Chiu v. United St**ates*, 948 F.2d 711, 715 (Fed. Cir. 1991) *citing* ***Pierce v. Underwood***, 487 U.S. 552 (1988). The determination that there was no substantial justification for the VA's position in VABCA-4669 necessarily results in the conclusion that there was no substantial justification for the VA's position assessing reprocurement costs in VABCA-4900.

**Fees And Expenses**

Adams is an eligible small business presenting a timely and properly itemized application. It is a prevailing party in the litigation and the Government's position was not substantially justified during the action. Consequently, under *EAJA*, Adams is entitled to recover its reasonable fees and expenses incurred in the prosecution of the appeals in VABCA-4669 and 4900.

Adams has applied for the recovery of fees and expenses in the amount of $26,044.49 for these two appeals. Award of fees and expenses where the threshold *EAJA* conditions are met is not automatic upon an applicants' surmounting the size, prevailing party, and substantial justification thresholds. The Supreme Court and the Federal Circuit clearly instruct that the amount of fees to be awarded is a matter for the Board's discretion. ***Commissioner, Immigration and Naturalization Service v. Jean***, 496 U.S. at 154 (1990); ***Neal & Company v. United States***, 121 F.3d 683 (Fed. Cir. 1997); ***Chiu***, 948 F.2d 711 (Fed. Cir. 1991).

Adams requests payment for 261.35 hours of attorneys services at the allowable statutory rate of $75.00 per hour ($19,601.25). The VA questions 1.95 hours of these services on the basis that the Application neither identifies the individuals performing the services nor the relation of the services to the appeals. In reviewing the invoices of Smith, Bundy, Bybee, and Barnett, PC, Adams' law firm, submitted with Adams' application, it is clear that the individuals questioned (identified in the invoices by initials) are firm members and that the services rendered relate to appeals. Providing no basis other than its bald assertion, the VA also contends that the hours of legal services claimed are excessive and requests that we reduce the legal fees to a "more reasonable" amount. We have thoroughly reviewed the detailed information on legal fees provided and find that 261.35 hours of legal services for the litigation of these appeals is reasonable and we will allow Adams to recover $19,601.25 in attorneys fees.

Adams also requests $652.50 for fees charged by its law firm for 14.5 hours of paralegal services. The VA argues that paralegal services should be paid as an expense defined by the actual costs of the paralegal to the firm, not the $45.00 rate billed to Adams for paralegal services. In ***Industrial Refrigeration Service Corp.***, VABCA No. 2532E, 93-1 BCA ¶ 25,291, recognizing that other boards limited recovery for paralegal services to the actual costs of the paralegal to the firm and thoroughly reviewing Federal Court precedent, we determined that
paralegal fees would be reimbursed at a reasonable billing rate. This was consistent with the Board's previous handling of paralegal fees. ***Berkeley Construction Co.***, VABCA No. 1962E, 88-3 BCA ¶ 20,941; ***Blosam Contractors, Inc.***, VABCA No. 2187E, 88-3 BCA ¶ 20,942.

There is a split among board's of contract appeals on the issue of the rate at which paralegal fees will be compensated. The Armed Services, Corps of Engineers, Interior, Agriculture, and Postal Service Boards of Contract Appeals, reimburse paralegal services at salary of the paralegal. ***Walsky Construction Company***, ASBCA No. 41541, 95-2 BCA ¶ 27,889; ***Ackon, Inc.***, ENGBCA No. 5593-F, 91-3 BCA ¶ 24,147; ***Gracon Corp.***, IBCA No. 2582-F, 90-1 BCA ¶ 22,550; ***Francis Paine Logging***, AGBCA No. 91-156-10, 92-3 BCA ¶ 25,043; ***Coastal, Inc.***, PSBCA No. 1728, 89-2 BCA ¶ 21,876. In addition to our Board, the General Services Board of Contract Appeals reimburses paralegal services at the rate the services are billed to a client. ***Security Services, Inc.***, GSBCA No. 12390-C, 94-1 BCA ¶ 26,499. Also, we note that the AGBCA, while following the majority of the other boards in limiting paralegal fees, has expressed serious reservations about the propriety of such limitations. *See* ***Francis Paine Logging***, 92-3 BCA ¶ 25,043, at 124,833 n.3.

The Armed Services Board of Contract Appeals (ASBCA) has consistently limited reimbursement of paralegal fees to the costs of the paralegal to the firm and serves as the leading proponent for the paralegal "cost" school among the boards. In the most recent iteration of its position on reimbursement of paralegal fees, ***Walsky***, 95-2 BCA ¶ 27,889, the ASBCA explored the subject in some detail.

As detailed in ***Walsky***, the ASBCA position, which originated in ***Shirley Contracting Corporation***, ASBCA No. 29848, 87-2 BCA ¶ 19,759, was based on a 1984 decision of the U. S. District Court for the District of Columbia. This position is grounded on the belief that *EAJA* requires the costs of paralegals to be characterized as "expenses", not fees, and the fact that an applicant should not be fully reimbursed for the paralegal "expenses" because *EAJA* "does not seek to fully compensate a prevailing party for its fees and expenses." ***Walsky*** at 139,135-36.

Section 504(a)(1) of *EAJA* states, in pertinent part:

> An agency that conducts an adversary adjudication *shall award*, to a prevailing party . . . fees and expenses *incurred by that party* in connection with that proceeding . . . [emphasis added]

The statutory direction is clear. Fees and expenses to be recovered by successful applicants are based on the charges to the applicant subject to our determination of the reasonableness of the charges. Of course, where Congress expresses specific restrictions on the amounts recoverable such as the attorney fee cap and expert witness fee rate restrictions in Section (b)(1) of *EAJA*, the specific direction controls. We also note, in light of Congress' clear direction to reimburse a successful applicant the reasonable fees and expenses it incurred, that whether paralegal costs are considered to be fees or expenses makes no difference to an applicant's ability to recover the amount it was billed for such services. Thus, we see no basis to restrict the amount an applicant can recover for the costs it incurred for the services of paralegals simply because Congress has elected to specifically restrict amounts payable for certain fees and expenses other than paralegal fees.

Since we find the statutory language of *EAJA* to be clear, we have no need to explore the legislative history to discern Congress' intentions. However, the opinion in ***Walsky***,

asserts that that the legislative history of *EAJA* is "unambiguous" as to Congress' intent to limit recovery for paralegal fees to the cost to the law firm. Even if it were appropriate for us to resort to the legislative history with regard to amounts to be recovered for paralegal services, we find the purportedly dispositive "legislative history" cited in ***Walsky*** to be neither unambiguous nor particularly compelling when compared with the actual language of the statute.

We also note that ***Walsky*** dismisses the Supreme Court's and our controlling Circuit's consistent expression, as well as that of other Federal courts, that paralegal fees are to be compensated at market rates in favor of its "well established precedent" on the basis that neither Supreme Court nor Federal Circuit precedent "requires" it to come to a different conclusion. ***Walsky***, 95-2 BCA ¶ 27,889 at 139,136. Our reviewing authorities have made it clear that paralegal fees in Federal fee shifting statutes are to be recovered at a reasonable billed rate. ***Missouri v. Jenkins***, 491 U.S. 274 (1989); ***Levernier Construction, Inc. v. United States***, 947 F.2d 497 (Fed. Cir. 1991); ***Kunz Construction Co., Inc. v. United States***, 16 Cl. Ct. 431 (1989), *aff'd* 899 F.2d. 1227 (Fed. Cir. 1990).

Further, we are loath to impose a disincentive to cost efficient litigation by discouraging the use of paralegals because a successful applicant cannot fully recover what it is charged for their services. ***Spectrum Leasing Corp. v. General Services Administration***, GSBCA No. 10902-C(7347), 93-1 BCA ¶ 25,317.

We agree with the United States District Court for the Eastern District of Virginia's statement, allowing *EAJA* paralegal fees at a market rate:

> The government also argues that the $50 hourly rate claimed for the work of law clerks and paralegals is excessive, and that such time should be compensated at the rate that the law firm actually pays these employees. However, the Supreme Court has held that in calculating awards under fee shifting statutes, paralegal and law clerk time should be compensated at market rates, not at the cost to the particular attorneys employing them. [citation omitted] Although Missouri v. Jenkins involved a § 1988 case, its holding and logic applies to other fee shifting statutes, including the EAJA.

***United States v. The Boeing Company***, 747 F.Supp. 319, 323 (E.D. VA 1990).
We adhere to our analysis in ***Industrial Refrigeration***: Fees incurred for paralegal services can be recovered at the rate billed subject to the statutory cap on attorney fees and our determination of reasonableness. 93-1 BCA ¶ 25,291. Thus, we find the 14.5 hours of paralegal services and the $45 per hour rate to be reasonable and Adams may recover $652.50 for paralegal services.

Adams requests legal office expenses as follows:

| Item | Amount $ |
|---|---|

| | |
|---|---|
| **long distance** | **129.62** |
| **postage/delivery** | **53.25** |
| **facsimile** | **139.00** |
| **copy/printing** | **1,147.74** |
| **attorney travel** | **38.75** |
| **legal research charge** | **256.28** |
| **total** | **1,764.64** |

Expenses of the nature claimed by Adams are recoverable under *EAJA*. As documentation for these expenses, Adams provides the itemized billings by its law firm. The various expenses are itemized by date on each invoice by date. Such expenses are recoverable under *EAJA*; however, Adams is entitled to recover only its reasonable expenses. The Board is entitled to examine the expenses claimed and, in its discretion, determine the reasonableness of the expenses claimed. ***Penn Environmental Control, Inc.***, VABCA No. 3726E, 1997 WL 688792 (November 4, 1997); ***Buckley Roofing Co., Inc.***, VABCA No. 3347E, 92-2 BCA ¶ 24,826.

Except for the $1,147.74 claimed for copying and printing expenses, we find the expenses claimed by Adams to be reasonable. Adams has provided no details supporting the extraordinarily large amount for printing and copying. The record in this case was not so extensive that it would support the amount of copying and printing claimed. In particular, the May 1996 billing by Adams' law firm shows a $450 charge for "Client Copy" on May 31, 1996; this charge was incurred subsequent to the closure of the evidentiary record in the appeal. We do not see such large overall copying and printing expenditures as reasonably necessary for the prosecution of the litigation. We will allow $500 as a reasonable copying and printing expense. Thus, Adams may recover $1,116.90 for office expenses.

Adams has claimed $4,026.10 in witness fees and expenses. The three witnesses for whom fees and expenses are claimed were fact witnesses who appeared at the hearing. Fees for fact witnesses may not be recovered under *EAJA*; however, reasonable witness travel expenses may be reimbursed. ***Fanning, Phillips & Molnar***, VABCA No. 3856E, 97-2 BCA ¶ 29,008; ***Fletcher & Sons, Inc.***, VABCA No. 3248E, 93-1 BCA ¶ 24,472. The bulk of the amount claimed is $3,927.50 for the fees of Mr. Crawley. Mr. Crawley was Adams' project manager who left Adams employ before the appeal. While it is clear from the record that Mr. Crawley's participation in the appeal was necessary, as explained in the cases cited above, Congress simply has not provided for payment of Mr. Crawley's fees under *EAJA*. Adams claims $98.60 for the fees and mileage for Messrs. Tezza and Wilson. Mr. Tezza and Mr. Wilson both appeared at the hearing under subpoena. Under the terms of the Board's subpoena, Adams was required to advance fees to Messrs. Tezza and Wilson as required by law. Thus, the $98.60 paid for the appearance of these witnesses is in the nature of allowable travel expenses, not a fee charged by a fact witness that can not be

recovered under *EAJA*. We will allow that amount.

**DECISION**

For the foregoing reasons, the Applicant, Adams Construction Co., Inc., is awarded fees and other expenses under the *Equal Access to Justice Act* under the applications in VABCA-4669E, 4900E as follows:

| Category | Amount |
|---|---|
| Attorney/Paralegal Fees | $20,253.75 |
| Office Expenses | 1,116.90 |
| Witness Expenses | 98.60 |
| Total | $21,469.25 |

DATE: **December 22, 1997**

RICHARD W. KREMPASKY
Administrative Judge
Panel Chairman

We Concur.

MORRIS PULLARA, Jr.
Administrative Judge

JAMES K. ROBINSON
Administrative Judge